Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

Gerald Theodore, Michaud - Petitioner

VS.

CHIEF JUDGE HUG; SCHROEDER, KOZINSKI, FARRIS, BRUNETTI and SILVERMAN CIRCUIT JUDGES - RESPONDENT(S)

and

UNITED STATES MAGISTRATE JUDGE FRANCIS I. YAMASHITA & UNITED STATES DISTRICT JUDGE SAMUEL P. KING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, AND U.S. SOLICITOR GENERAL et al,

Real Parties in Interest.

ON INFORMAL PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gerald Theodore, Michaud
In Proper Person
P.O. Box 10236
Lahaina, Hawaii 96761
(808) 665-1077

35PP

QUESTIONS PRESENTED

1. Were Petitioner's right to a jury trial abandoned when the United States Court of Appeals for the Ninth Circuit ("Ninth") arbitrarily dismissed case.
2. Were Petitioner's right to contract impaired when the Ninth regulated Petitioner's remedy for its enforcement.
3. Were the rights of Petitioner violated by the Ninth, when those presiding justices departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower courts, a court whose duty it is to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon, Boyd v. U.S., 116 US 635, when they failed to issue the Writ of Error ("Writ") supported by oath and asseverations.
4. Were the due process rights of Petitioner violated when the Ninth summarily and arbitrarily denied the Writ without, as a minimum, a hearing, when a fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias, In Re Murchison et al, 349 US 133, 136 (1955), when the pleadings contain positive proof, by sworn affidavit, that the allegations in the Writ are valid.
5. Were the equal protection rights of Petitioner violated when the Ninth became immune by judicial edict from obeying the mandates of the Constitution when the citizens themselves are held to the mandates of the Constitution.
6. Has the right of Petitioner to a republican form of government been denied by the Ninth, who protected and clothed the lower courts with

the power to annul or evade the state and federal constitutions, by the denial of the Writ in the face of overwhelming evidence.

7. Were the Privilege and Immunity rights of Petitioner violated by the summary denial of the Writ without affording Petitioner opportunity for a hearing and/or the issuance of a Writ when the evidence is beyond any reasonable doubt.
8. Were the property rights (to submit an action and have a remedy) of Petitioner violated by the arbitrary summary denial of Writ when it is Petitioner's chose in action right. Gregory v. Colvin, 235 Ark. 1007, 363 S.W.2d 539, 540.
9. Were the rights of Petitioner violated by the arbitrary and summary denial of the Writ because the Ninth failed to compel the lower courts to perform in accordance with a constitutional provision, a plain and palpable violation of the constitution.
10. Were the rights of Petitioner violated when the lower court arbitrarily taxed Petitioner's right to a jury trial.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

SUPREME COURT JUSTICES' RONALD MOON; ROBERT KLIEN; PAULA NAKAYAMA; STEVEN LEVINSON; MARIO RAMIL OF THE SUPREME COURT OF THE STATE OF HAWAII, AND CIRCUIT COURT JUDGES E. JOHN McCONNELL & BOYD P. MOSSMAN OF THE CIRCUIT COURT OF SECOND CIRCUIT STATE OF HAWAII; ATTORNEYS McCORRISTON, MIHO, MILLER, AND MUKAI ON BEHALF OF STATE FARM INSURANCE COMPANIES; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT; ATTORNEYS TAM O'CONNOR & HENDERSON ON BEHALF OF KIHEI RENT A CAR COMPANY AND CRAWFORD & COMPANY; INSURANCE COMMISSIONER WAYNE METCALF, STATE OF HAWAII INSURANCE DIVISION; HAWAI'I ATTORNEY GENERAL MARGERY BRONSTER; UNITED STATES ATTORNEY STEVEN ALM FOR THE DISTRICT OF HAWAII, AND FEDERAL BUREAU OF INVESTIGATION AGENT HAROLD MARSHAL FOR THE DISTRICT OF HAWAII,

Real Parties in Interest.

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MAXIMS OF LAW

"The law wills that, in every case where a man is wronged and endamaged, he shall always have a remedy." Coke on Littleton 197b; Branch's Principia Legis et Equitatis; Broom's Legal Maxims 192, John Bouvier's Institutes of American Law 2411 .. 24

"It is just that every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character." American Maxim 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was NOVEMBER 20, 1998, and appears at Appendix "D".

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOVEMBER 4, 1998, and a copy of the order denying rehearing appears at Appendix "C".

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 1, of the United States Constitution States:

> "The Citizens of each state shall be entitled to all privileges and immunities of Citizens in the several states."

Article IV, Section 4, of the United States Constitution states:

> "The United States shall guarantee to every state in this union a Republican Form of Government,..."

Fifth Amendment to the Constitution reads, in part, as follows:

> "...nor be deprived of life liberty, or property, without due process of law;..."

Seventh Amendment to the Constitution reads, in part, as follows:

> "In suits at common law...the right of trial by jury shall be preserved..."

Article I Section 10 (1) to the Constitution reads, in part, as follows:

> "No State shall pass...any...law impairing the obligation of contracts..."

Hawaii State Constitution Article I Section 5 reads, in part, as follows:

> "No person shall be deprived of life liberty, or property, without due process of law; nor be denied the equal protection of the laws..."

Hawaii State Constitution Article I Section 13 reads, in part, as follows:

> "In suits at common law...the right of trial by jury shall be preserved..."

Hawaii Revised Statutes § 1-1 reads, in part, as follows:

> "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases..."

Hawaii Revised Statutes § 490:1-103 reads, in part, as follows:

> "Supplementary general principles of law applicable..."

Hawaii Revised Statutes § 602 - 4 reads, in part, as follows:

> "The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."

Hawaii Revised Statutes § 602 - 5(4)(6) reads, in part, as follows:

> "The supreme court shall have jurisdiction and powers as follows:
>
> (4) To exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction..."
> (6) To make or issue any order or writ necessary or appropriate in aid of its appellate or original jurisdiction, and in such case any justice may issue a writ or an order to show cause returnable before the supreme court..."

CASES SUPPORTING JURISDICTION

Haines v. Kerner, 404 U.S. 519, 520;

Clough vs. Lewis, 134 U.S. 361, 371;

Bacon v. Texas, 163 U.S. 207,

Sugar Refining Co., 125 U.S. 18

STATEMENT OF THE CASE

This case arises from an original action in the nature of a Writ of Error ("Writ") filed with the United States Court of Appeals for the Ninth Circuit ("Ninth"), which was denied summarily, barring Petitioner's due process rights by not addressing the material points of fact and law as overlooked in its decision, making it apparent that it is in conflict with other decisions of the court which were not addressed in the opinion, and thereby substantially affected a rule of national application in which there is an overriding need for national uniformity. Petitioner received from the Office of the Clerk, United States Court of Appeals for the Ninth Circuit, Notice of Entry of Judgment (that conflicts with FRCP 41 (a) (2); Appendix D), Petition for Rehearing with Suggestion for Rehearing En Banc (FRAP 35, CIRCUIT RULE 35), Grounds for suggesting En Banc Consideration:

> "Parties should seek en banc consideration only if one or more of the following grounds exists: (3) when the opinion...substantially affects a rule of national application in which there is an overriding need for national uniformity."

On or about April 29, 1994, while Petitioner was abiding in the county of Maui, State of Hawaii, engaged in the act of traveling in his automobile, around or near Kihei, Maui, Hawaii, Petitioner experienced the bad fortune of being hit head-on by an automobile owned by one Kihei Rent a Car Company, whose automobile caused serious damage to Petitioner's physical body and personal property.

Hawaii is a no-fault insurance state, governed by Hawaii Revised Statutes ("HRS"). HRS provides restitution of all physical damages which exceed a fixed threshold figure. HRS §§ 431:10C-306 and 308. Petitioner's damages qualified immediately.

HRS §§ 1-1 & 490:1-103 also guarantees the right to common law jurisdiction, of which Petitioner timely reserved explicitly.

It is just that every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character.

State Farm Mutual Automobile Insurance Company ("State Farm"), was Petitioner's insurance carrier for approximately eight years up to the April 29, 1994 incident, and is still insuring Petitioner today. State Farm handled two separate contractual policies for Petitioner. Insurance contracts include the State of Hawaii Insurance Division. State Farm refused to settle Petitioner's claims, alleging Petitioner's policy was cancelled. Petitioner's cross allegation was that a policy can not be cancelled without first complying with the HRS mandates governing cancellations.

October 31, 1994, Petitioner filed with the State of Hawaii Insurance Division a Complaint against State Farm along with a Petition for a Declaratory Ruling. The issues raised for Declaratory Ruling were regularly circumvented by the Hawaii Insurance Division, this prompted Petitioner to contact the State of Hawaii Ombudsman for help in resolving the instant matter. The Ombudsman initiated an immediate response from the Hawaii Insurance Division who merely replied by wresting Petitioner's issues causing the Ombudsman to summarily abandon the matter.

On or about November 7, 1995, Petitioner, in propria persona Haines v. Kerner, 404 U.S. 519, 520, filed a Complaint in the proper venue and jurisdiction of the Circuit Court of the Second Circuit for the State of Hawaii ("HCC"), which included a Demand for a Jury Trial, firmly incorporating the federal question into this instant matter against State

Farm, et al, Civil Number 95-0844 (1), for not honoring its no-fault insurance contract with Petitioner.

State Farm, on February 15, 1996, under color of law, removed Complaint over Petitioner's objections to the United States District Court for the District of Hawaii, claiming diversity of citizenship while the issues at bar concern the State of Hawaii, making it, et al, parties to the suit.

> "As a general rule, if plaintiff has a remedy under both state and federal law, it may base its claim solely on state law and thus defeat defendant's potential right to removal, if diversity of citizenship is lacking...Removability is to be determined from the face of the complaint at the time of removal." Coditron Corp. v. AFA Protective Systems, Inc., 392 F. Supp. 158 (1975), 28 U.S.C.A. § 1447 (c).

Numerous federal questions, had been thoroughly presented in Petitioner's September 9, 1996, eighteen (18) page Memorandum in response to findings and recommendation filed in the United States District Court for the District of Hawaii on September 3, 1996. The United States Court of Appeals for the Ninth Circuit, on or about March 6, 1997, received the aforementioned federal questions under the title of, "Appellant's or Petitioner's Informal Brief" (originally filed as a writ of error, arbitrarily changed by the Ninth), same was not filed until five months following on July 11, 1997. The timely raised federal questions (including over thirty four cases) were overlooked, and remain unsettled.

> "The doctrine of stare decisis, commonly called the 'doctrine of precedents,' means that we should adhere to decided cases and settled principles and not disturb matters which have been established by judicial determination." Johnson v. Western Union Tele. Co., (N.C.) 57 S.E. 122, 124.

March 13, 1996, Petitioner filed in the Hawaii Supreme Court an Appeal, Number 19717. May 29, 1996, in the interest of brevity, the Appeal was summarily denied by Order without hearing.

January 31, 1996, Petitioner filed a Complaint with the State of Hawaii Ombudsman's office against the State of Hawaii Insurance Division, of which both departments of government summarily avoided Petitioner's particular issues so critical to State Farm.

Petitioner, on April 24, 1996, filed a complaint in the HCC against Kihei Rent A Car Company, and Crawford & Company, et al, ("Kihei"), Civil Number 96-0344 (3), for breach of good faith and fair dealing with regard to damages Petitioner sustained due to Kihei's automobile, said complaint included a Demand for a Jury Trial, firmly incorporating the federal question in this matter also.

Kihei's action was summarily dismissed on October 17, 1996. Petitioner filed on October 31, 1996, in the Hawaii Supreme Court, Number 20404, a Notice for Supervisory Jurisdiction, in the Nature of a Writ of Error. It to summarily dismissed without hearing on May 13, 1998.

On May 18, 1998, Petitioner filed in the United States District Court for the District of Hawaii, number CV98 00395 SPK an Informal Notice of Petition in the Nature of a Writ of Error Now Termed Appeal. Petition summarily dismissed without hearing on September 8, 1998.

Since it appeared that the actions of those responsible for protecting Petitioner's rights were also in violation of United States Criminal Codes, Petitioner furnished the US Attorney a Witnessed Affidavit of Probable Cause and Complaint dated May 9, 1998 ("Fed. Complaint"), Certified Mail # P 398 097 783. Petitioner did not receive a response from US Attorney until July 21, 1998 (nearly three months later), acknowledging the Fed. Complaint, who stated that it had been forwarded to the FBI for review

of any federal violations. Extraordinary conditions may call for extraordinary remedies. Schechter v. United States, 295 U.S. 495, 528.

On July 22, 1998, Petitioner received a telephone call from FBI Agent Hal Marshal of which Petitioner responded by filing a telephone confirmation letter. On two separate occasions (September 2, 1998 and October 2, 1998) Petitioner requested from the US Attorney and the FBI (carbon copy US Justice) a request for disposition. Petitioner has received no reply to this date.

Petitioner, on October 14, 1998, filed in the Ninth an "Informal Petition for Review & Consolidation" of Kihei with State Farm. Petition summarily denied without hearing on November 13, 1998.

The necessity for a writ arose as a result of Petitioner's observation that the State of Hawaii Insurance Division ("HID"), the State of Hawaii Ombudsman ("Ombudsman"), the Hawaii Circuit Court for the Second Circuit ("HCC"), the Hawaii Supreme Court ("HSC"), the United States District Court for the District of Hawaii ("HFDC"), the Attorney General for the State of Hawaii ("HAG"), the United States Attorney for the State of Hawaii ("US Attorney"), the Federal Bureau of Investigation for the State of Hawaii ("FBI"), the United States Department of Justice, Washington, D.C. ("US Justice"), and the Ninth are not complying with the federal and/or state Constitutions.

Precision and certainty are often of more importance to the rules of law than their abstract justice. 9 Wheat (22 U.S.) 598, 602.

FEDERAL QUESTION TIMELY AND PROPERLY RAISED

The aforesaid federal questions were timely and properly raised and yet there are continual violations of the Constitutional provisions in that:

1. It would appear on record that the federal and state agencies have prejudiced Petitioner by not noticing any of the issues as presented by Petitioner regarding the April 29, 1994 cause of action supra. Nor has any of the aforesaid departments of government acknowledged;

2. Proper jurisdiction concerning Petitioner's proper person:

> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear or unquestionable authority of law." Union Pac. Ry. V. Botsford, 141 U.S. 250, 251.

3. The federal questions were timely noticed in the State Farm Demand for Jury trial, and again in the HFDC September 9, 1996 Memorandum ibid., overlooked by the HCC, HSC, HAG, HFDC, and Ninth.

4. The federal question with regard to Kihei was noticed in the April 24, 1996 Complaint, and demand for Jury trial, ibid., raised again in Petitioner's July 16, 1996 HCC Memorandum pages 2 and 4 declaring that, "the issues are to be decided by a jury", and again on July 25, 1996, in Petitioner's HCC Memorandum at page 3 Demanding a jury trial, which was overlooked by the HCC, HSC, HAG, HFDC, and Ninth.

ARGUMENT

ADMINISTRATIVE REMEDIES

Having observed these errors in irregular proceedings (including alterations to Petitioner's filings) where the Ninth arbitrarily dishonored Petitioner's pleadings to correct the record, Petitioner took administrative steps to resolve the problem. Petitioner prepared personal letters that included an affidavit of probable cause in hopes that the proper agencies and/or departments of government ibid., would resolve the situation at hand.

Even though the matter has been brought to their attention, neither proper procedure nor fixed decisions have been addressed and/or corrected as of this date.

The Hawai'i Attorney General has not filed an explanation for these constitutional violations nor an adequate remedy.

The October 31, 1994, Complaint in the HID against State Farm, inevitably including Kihei, ended due to stalling about June 11, 1996.

WRIT OF ERROR

Since the HCC, HSC, and HFDC have never been issued an order to show cause, Petitioner submitted to the Ninth, November 20, 1996, a Notice of a Termed Appeal for Supervisory Control in the nature of a Writ of Error ("Writ").

Departing from Rule 21 of the FRAP, and Ninth Circuit Rule 21, the Ninth arbitrarily modeled the Petitioner into a Respondent, and ordered same to file extra pleadings, affidavits, and asseverations attesting to off point issues, all of which is contrary to Rule 21 FRAP, and Circuit Rule 21. Petitioner submitted overwhelming evidence to the Ninth which requires the Writ to issue. The Ninth never established whether or not the Writ was abolished by statute, thereby securing same to Petitioner as a Writ of right. Winchester v. Winn, 225 Mo. App. 288, 29 S.W.2d 188, 190.

The Ninth failed to issue the Writ, knowing full well that a Writ is appropriate for Petitioner's common law action, and proper when the lower courts fail to perform in conformance with the federal and state

Constitutions. Petitioner clearly exhausted all other remedies, and supported the Writ by proper asseverations, therefore, the Writ should have issued. However, twice, said Writ has been arbitrarily and summarily denied by the Ninth without a hearing.

REASONS FOR GRANTING THE PETITION

SUBSTANTIALITY OF FEDERAL QUESTION

This Writ presents an important and substantial question of the first impression, as hereinafter described, in that the issue it presents is the constitutionality of denying the Petitioner, who is a unique component of the people of the state, the ability to bring an action against the federal/state administrative agencies of government, and/or honorable justices when they do not perform in accordance with the constitution, and denies not only the Petitioner, but also the body of people that make up the state, for if they deny one they deny all due process of law, in that no hearing was set, which denies Petitioner and respectively the people their day in court.

Petitioner was only afforded a one sided hearing in order to eliminate Petitioner's significant federal questions, and, as the result of eliminating the Writ, and the fact that Petitioner has exhausted all other remedies, the United States Supreme Court has become the first and only court to which Petitioner can appeal.

Petitioner maintains that there can be no violation of the law without a remedy, and all actions are appealable to at least one higher

judicial body which is mandated to hear the issue, except when the United States Supreme Court exercises its original jurisdiction.

> "Remedies are the life of rights." Campbell v. Holt, 115 U.S. 620, 631. "Remedy signifies the judicial means for enforcing a right or redressing a wrong." Walters v. City of Ottawa, 88 N.E. 651, 654, 240 Ill. 259.

THE WRIT OF MANDATE

In order for a writ to issue, it need only be shown that:

1. A duty is imposed --- Mandamus does not lie to compel discretionary acts. Brashear v. Mason, 6 How 92. However, in this case, the duty in question is not discretionary but constitutionally mandated and Petitioner established that a duty exists in the basic pleading.
2. Petitioner has the right to demand performance --- Any citizen has a natural right to expect his government to obey the law; therefore any citizen who observes the disobedience of the law has a right to demand performance.

Petitioner recognizes that a Writ of Mandate cannot generally be demanded as a matter of right, and is awardable at the discretion of the court. However, where a clear legal right to a writ is shown, the court has no discretion about granting it. Illinois Central R. Co. v. People, 143 Ill 343, 33 N.E. 173.

Would it not follow that a citizen has the right to a writ of mandate to compel public ministers to perform statutory duties, even though the details of such performance are left to the discretion of the court?

3. Petitioner has made the demand for a jury trial in the State Farm and Kihei actions upon original filings, for which the HCC has unconstitutionally taxed Petitioner to insure this right. This alone would raise another federal question.

> "Due process of law as a guarantee of trial by jury in the judicial branch of government---The words "law of the land" or "due process of law," when used in considering the property rights of individuals, means summons or notice, such as is ordinarily given upon the institution of a suit, due appearance of the parties in interest, pleading facts in issue, and a determination thereof by a jury." State v. Rose, 33 Del. 168, 132, A 865, 45 ALA 85

Because Petitioner has not been accorded a jury trial:

> "Party may seek relief in form of mandamus to protect right to jury trial." (1991) U.S.C.A. Const. Amend. 7. –Wilmington Trust v. U.S. Dist. Court for Dist. Of Hawaii, 934 F. 2d 1026, certiorari denied Connecticut Bank and Trust Co. v. Wilmington Trust Co., 112 S.Ct. 1578, 503 U.S. 966, 118 L.Ed.2d 220.

4. The lower courts have the ability to comply, and there can be no doubt that Respondents have the capacity to perform as the law demands.

> "Where trial court has discretion to act, mandamus will not lie to interfere with or control exercise of discretion, even when judge has acted erroneously, unless judge has exceeded his or her jurisdiction, has committed flagrant and manifest abuse of discretion, or has refused to act on subject properly before court on which judge is subject to legal duty to act. (1996) State ex rel. Kaneshiro v. Huddy, 921 P.2d 108, 82 Hawai'i 188, reconsideration denied 922 P.2d 973, 82 Hawai'i 360.

5. There is no other plain, speedy, and adequate remedy. Petitioner has appealed to all persons concerned only to be ignored.

Clearly a Mandamus lies to compel performance of a statutory duty when it is clear and indisputable and there is no other legal remedy. Baynard v. U.S., 127 U.S. 24, If a mandamus lies to compel a mere statutory duty, a mandamus lies to compel a constitutional duty.

A Mandamus is an extraordinary remedy in cases where the usual and ordinary modes of proceeding are powerless to afford remedies to the parties aggrieved, and when without its aid, there would be a failure of justice. Virginia, T & C Steel & Iron Co., v. Wilder, 14 S.E. 806. In this instant matter there is no ordinary mode that has not already been attempted, and with the summary denial of Petitioner's Writ, there is also a failure of justice. All have improperly acted on Petitioner's subject matter.

> "It (mandamus) ought to be used upon all occasions when the law has established no specific remedy, and there ought to be one. If there be a right, and no other specific remedy, the writ should not be denied." Lord Mansfield in Rex v. Barker, 3 Burr. 1265. See also Lord Ellenborough in Rex v. Archbishop of Canterberry, 8 East 219.

The Writ of Mandamus is the supplementary remedy when the party has a clear right, and no other appropriate redress, in order to prevent a failure of justice. 12 Peter sd. Abr. 438 (309). Petitioner has a clear right to expect his public ministers to perform in accordance with the Constitution, and when they fail to so perform the writ of mandamus must be issued.

All persons involved have failed to perform in compliance with either the Hawaii Constitution, or the Federal Constitution and the Mandamus must be issued.

The question is squarely before the Court and the issue and the time is ripe for consideration. The Court has a duty to evoke its jurisdiction in this case because it involves the private rights of every citizen in the state.

The words of Supreme Court Justice Brandeis are very appropriate in this matter when he stated:

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means...would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." Justice Brandeis, in Olmstead v. United States, 277 U.S. 438, 485 (1928).

When the judiciary fails to accept its responsibility and meet constitutional violations head on, then justice has died and the country will soon follow.

CONCLUSION

The record clearly establishes that:

1. Each court and government agency involved with Petitioner's claims are aware of the Constitutional requirements governing citizens rights.

2. The entire judicial system involved in Petitioner's claims had been made aware of the Constitutional provisions from the outset, and willfully and knowingly ignored said provisions, falsely accusing Petitioner under color of law of wrong doing, and therefore approved the actions of each individual implicated in the instant matter.
3. In addition, the fraudulent keeping of the original filings is an act in direct contravention with their oath to support and obey the Constitution of the United States of America. Their actions constitute a breach of contract with Petitioner.
4. Petitioner proved beyond any reasonable doubt, by settled decisions of law, supported by affidavits and asseverations in the original pleadings submitted to the HCC, HSC, and the HFDC, placing them in direct violation of the Federal and State Constitutions, and therefore the Ninth should have issued the Writ.
5. The HSC failed in their duty to issue a writ that was properly supported.
6. The HFDC and Ninth failed in their duty to issue a writ that was properly supported.
7. The summary actions by the aforesaid courts, not to mention the US Attorney and FBI, have left the Petitioner along with the citizens of Hawaii without a remedy within the state to rectify constitutional violations by any member of the executive, or judicial branches of government.

In this case the Petitioner, along with the people of Hawai'i, are being denied their day in court; Petitioner has been denied an action, thereby causing constitutional violations; been denied a hearing; been denied

privileges and immunities; been denied a republican form of government; and finally been denied due process of law.

By denying the Writ, the Ninth has denied Petitioner a remedy in those instances when his public ministers (executive, and judicial) are not complying with the Supreme law of the land. The law wills that:

> "In every case where a man is wronged and endamaged, he shall always have a remedy." Coke on Littleton 197b; Branch's Principia Legis et Equitatis; Broom's Legal Maxims 192, John Bouvier's Institutes of American Law 2411.

When the lower courts refuse to address federal Constitutional issues, the United States Supreme Court must intercede and order the lower courts to, as a minimum, hear the issue in order to protect the rights of the citizens of the states.

Therefore, the United States Supreme Court must exercise its jurisdiction in this case or lawlessness will reign supreme in Hawai'i. If it will not, then the federal and state Constitutions need to be pronounced either dead or obsolete.

> "Behold, I have taught you statutes and judgments, even as the LORD my God commanded me, that you should do so in the land whither you go to possess it. Keep therefore and do them; for this is your wisdom and your understanding in the sight of the nations, which shall hear all these statutes, and say, Surely this great nation is a wise and understanding people." Deut. 4:5-6.

The petition for a writ of certiorari should be granted.

Respectfully submitted this 20th, day of January, 1999

Gerald Theodore, Michaud - Petitioner

NO. _____

IN THE

SUPREME CO'RT OF THE UNITED STATES

OCTOBER TERM, 1998

Gerald Theodore, Michaud - Petitioner

VS.

CHIEF JUDGE HUG; SCHROEDER, KOZINSKI, FARRIS, BRUNETTI and SILVERMAN CIRCUIT JUDGES - RESPONDENT(S)

and

UNITED STATES MAGISTRATE JUDGE FRANCIS I. YAMASHITA & UNITED STATES DISTRICT JUDGE SAMUEL P. KING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, AND U.S. SOLICITOR GENERAL et al,

Real Parties in Interest.

PROOF OF SERVICE

I, Gerald Theodore, Michaud, do declare that on this date, January 23, 1999, as required by Supreme Court Rule 29 I have served the enclosed Informal Petition For A Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Honorable Chief Judge Hug, Honorable Schroeder, Kozinski,
Farris, Brunetti and Silverman Circuit Judges
United States Court of Appeals For The Ninth Circuit
95 Seventh Street
San Francisco, CA 94119-3939

Honorable U.S. Magistrate Francis I. Yamashita
United States Courthouse, Room C-340
Prince Kuhio Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Honorable U.S. District Judge Samuel P. King
United States Courthouse, Room Aha Kanawai
Prince Kuhio Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Honorable Supreme Court Justices,
Ronald Moon, Robert Klien, Paula
Nakayama, Steven Levinson, & Mario Ramil
417 South King Street
Honolulu, Hawaii 96813-2911

The Honorable E. John McConnell & Boyd P. Mossman
Second Circuit Court
2145 Main St.
Wailuku, Maui, Hawaii 96793

The Honorable Margery Bronster
Department of the Attorney General
425 Queens Street
Honolulu, HI 96813

State Farm Ins. Co., Robert (Bob) Yoshino; Scott A. Gilmore;
Karen Perreira; Frances Yost; A. Don Smith; Monique Catcott,
C/O Attorneys McCorriston Miho Miller Mukai
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaii 96813

Kihei Rent A Car Company & Crawford & Company
C/O Attorneys Tam O'Connor & Henderson
Central Pacific Plaza, Suite 2000
220 South King Street
Honolulu, Hawaii 96813

State Of Hawaii Insurance Division, Dept. of Com. & Cons. Affairs
Atten: Mr. Wayne Metcalf, Insurance Commissioner
P.O. Box 3614
Honolulu, Hawaii 96811-3614

United States Attorney, Stephen Alm
Prince Kuhio Federal Building
300 Ala Moana Boulevard, Rm. 6100
Honolulu, Hawaii 96850

Federal Bureau of Investigation
Attn. Hal Marshal, FBI Agent
Prince Kuhio Federal Building
300 Ala Moana Boulevard, Rm. 4307
Honolulu, Hawaii 96850

US Department of Justice
Ben Franklin Station, Box 683
Washington, D.C. 20044

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 28th, 1999

Gerald Theodore, Michaud - Petitioner

APPENDIX "A"

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS JUL 24 1998

FOR THE NINTH CIRCUIT CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GERALD T. MICHAUD Plaintiff-Appellant, v. STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT; JOHN DOES 1-10, inclusive; JANE DOES, inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10; inclusive; GOVERNMENTAL ENTITY DOES, 1-10, inclusive, Defendants-Appellees.	No. 96-17212 D.C. No. CV-96-00155 SPK
GERALD T. MICHAUD Plaintiff-Appellee, v. STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT, Defendants-Appellants,	No. 96-15387 D.C. No. CV-96-00155 SPK

JOHN DOES 1-10, inclusive; JANE DOES, 1-10 inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10; inclusive; GOVERNMENTAL ENTITY DOES, 1-10, inclusive, Defendants.	)	MEMORANDUM[1]

Appeal from the United States District Court
District of Hawaii
Samuel P. King, Senior Judge, Presiding

Submitted July 20, 1998[2]

Before: HUG, Chief Judge; SCHROEDER and KOZINSKI, Circuit Judges

Gerald T. Michaud appeals pro se the district court's dismissal without prejudice of his action against State Farm Mutual Insurance Company and others. State Farm cross-appeals, asserting the dismissal should have been with prejudice. We affirm.

The district court did not abuse its discretion by dismissing the complaint for failure to comply with a court order, where Michaud failed to appear at two pretrial conferences and, after being warned that he risked dismissal, failed to provide an adequate response to, or appear at a hearing as ordered in, the district court's order to show cause for his failure to appear at the first conference. *See Toth v. Trans World Airlines, Inc.*, 862

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3

F.2d 1381, 1385 (9th Cir. 1988) (dismissal for failure to comply with court order reviewed for abuse of discretion).

With regard to State Farm's cross-appeal, we cannot say that the district court's decision to dismiss without prejudice, rather than with prejudice, constituted an abuse of discretion. See generally *Hernandez v. City of El Monte*, 138 F.3d 393, 402 (9th Cir. 1998) (noting considerations which make dismissal with prejudice more difficult to justify than dismissal without prejudice). The judgment, accordingly, is

AFFIRMED.

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[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GERALD T. MICHAUD Plaintiff, vs. STATE FARM MUTUAL, AUTOMOBILE INSURANCE COMPANY, et al., Defendants.	CIV. NO. 96 00155 SPK ORDER FILED IN THE UNITED STATES DISTRICT COURT DISTRICT OF HAWAII OCT 15 1996 at 10 o'clock and 50 min. AM WALTER A. Y. H. CHINN, CLERK By

ORDER ADOPTING MAGISTRATE'S
FINDINGS AND RECOMMENDATION

On November 7, 1995, Plaintiff pro se Gerald T. Michaud ("Michaud") filed a complaint in the Circuit Court of the Second Circuit State of Hawaii against Defendant State Farm Automobile Insurance Company ("State Farm"). State Farm filed a Notice of Removal on February 15, 1996. Michaud filed a "Response" to the Notice of Removal on March 8, 1996. Michaud neither filed a motion nor made an informal request in his "response" to remand the case back to the Second Circuit Court. Michaud did not argue that the Notice of Removal was procedurally defective. Michaud's argument was that the Notice violated Rule 11 of the Federal Rules of Civil Procedure. He informally suggested that he court sua sponte impose sanctions against State Farm. The court did not impose any Rule 11 sanctions.

By order dated February 15, 1996, the court set a Rule 16 pretrial conference with Magistrate Judge Francis Yamashita for May 13, 1996. Michaud failed to appear at the May 13 conference and failed to file a meeting of the parties statement as required by Local Rule 230-1(d). On May 15, 1996 the court rescheduled the conference to June 4, 1996, ordering Michaud to appear and to show cause for failure to appear at the May 13 conference. The order warned that failure to respond would result in dismissal of the case. On May 23, 1996, Michaud filed a response to the court's order to show cause, stated that he "refutes the validity of Defendant's authority to remove this suit from state court," and requested the court to "remand this matter for probable cause." Michaud returned his copy of the order to show cause and did not appear at the June 4 conference. The court has not been able to issue a trial schedule because Michaud has not appeared at the pretrial conferences.

Magistrate Judge Yamashita issued Findings and Recommendation on September 3, 1996 for the issue of Michaud's failure to attend the pretrial conferences. The Magistrate found that Michaud's failure to attend the conferences was an inexcusable violation of a court order and recommended that this court dismiss the action without prejudice. Michaud filed a Memorandum in response to Findings and Recommendation on September 9, 1996. Michaud made twenty-two arguments in response to the Findings and Recommendation. The arguments allege defects in the removal procedure and challenge the court's jurisdiction in this matter, but otherwise do not offer any explanation for his failure to attend the conferences.

II. STANDARD OF REVIEW

This court reviews de novo a Magistrate's dispositive proposed orders, findings, or recommendations. Local Rule 404-2.

III. DISCUSSION

Michaud alleges a number of procedural defects in State Farm's removal of the action to this court. Statute provides that:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. 1447 (c). State Farm filed notice of removal on February 15, 1996. The deadline for Michaud to file a motion to remand the case based on defects in the removal process passed in March. Michaud did not raise any arguments alleging specific procedural defects until more than five months after the deadline when he filed his memorandum in response to the Magistrate's Findings and Recommendation on September 9, 1996.

The record shows that Michaud first contested State Farm's authority to remove the case in his May 23 memorandum. May 23 was still well beyond the deadline to raise procedural defects in removal, but even then, Michaud's argument against removal was based on lack of subject matter jurisdiction rather than procedural defects. Michaud filed a "Demand for Proof of Jurisdiction" on May 28, 1996. The court interpreted this document as a Motion to Remand for Lack of Subject Matter Jurisdiction. The court denied the motion/demand on July 5, 1996.

Michaud's procedural arguments challenging removal to this court are not timely. However, a litigant may raise the issue of whether the court has subject matter jurisdiction at any time. The statute directs the district court to remand the case back to the state court if it appears at any time before final judgment that the federal court lacks subject matter jurisdiction. Id. (emphasis added). Upon review of Michaud's arguments, the court concludes for the same reasons explained in its July 5 order that there is proper subject matter jurisdiction in this case based on diversity of citizenship.

Having concluded that the court has jurisdiction over this matter, the court turns to the Magistrate's Findings and Recommendation. This court may dismiss an action under Rules 16 (f), 37 (b), or 41 (b) for failure to comply with court rules or court orders. See Morris v. Morgan Stanley & Co., 942 F.2d 648, 650 (9th Cir. 1991). A involuntary dismissal may be with or without prejudice. Johnson v. U.S. Department of the Treasury, 939 F.2d 820, 825 (9th Cir. 1991). The court should afford the litigant prior notice of its intention to dismiss. Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987), cert. Denied 488 U.S. 819 (1988). The sanction of dismissal without prejudice is appropriate when a pro se litigant refuses to obey a Magistrate's orders in face of warnings that such conduct could result in dismissal of the case. See, e.g., Dukes v. New York City Police Com'r Ward, 129 F.R.D. 478 (S.D.N.Y. 1990).

The court agrees with the Magistrate's conclusion that Michaud failed to articulate a legitimate reason for failing to comply with a court order. The court warned Michaud that failure to comply would result in dismissal of the case. Accordingly, this court ADOPTS the Magistrate's Findings and Recommendation and DISMISSES the case without prejudice.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, October 15, 1996.

SAMUEL P. KING
United States District Judge

APPENDIX "C"

FILED

NOV 4 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD T. MICHAUD

Plaintiff-Appellant,

v.

STATE FARM INSURANCE, et al.,

Defendants-Appellee.

No. 96-17212
No. 97-15387

D.C. No.
CV-96-00155-SPK
Hawaii (Honolulu)

ORDER

Before: Chief Judge HUG; SCHROEDER and KOZINSKI, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "D"

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-17212
CT/AG# : CV-96-00155-SPK

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

NOV 20 1998

at 2 o'clock and 10 min. PM
WALTER A. Y. H. CHINN, CLERK

GERALD T. MICHAUD

Plaintiff-Appellant,

v.

STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT; JOHN DOES 1-10, inclusive; JANE DOES, inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10; inclusive; GOVERNMENTAL ENTITY DOES, 1-10, inclusive,

Defendants-Appellees.

No. 96-15387
CT/AG# : CV-96-00155-SPK

GERALD T. MICHAUD

Plaintiff-Appellee,

v.

STATE FARM INS.; ROBERT (BOB) YOSHINO; SCOTT A. GILMORE; KAREN PERREIRA; FRANCES YOST; A. DON SMITH; MONIQUE CATCOTT

Defendants-Appellants,

JOHN DOES 1-10, inclusive; JANE DOES, inclusive; CORPORATION DOES 1-10; inclusive; PARTNERSHIP DOES 1-10; inclusive; GOVERNMENTAL ENTITY DOES, 1-10, inclusive,

Defendants

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered - 7/24/98.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

NOV 13 1998

by: _____
Deputy Clerk